

NO. PD-0284-21

IN THE COURT OF CRIMINAL
APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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EX PARTE
CEDRIC RICHARDSON

From the Court of Appeals for the Second District of Texas
02-19-00478-CR
Appealed from Denial of Writ of Habeas Corpus
Cause No. 1503620D
Criminal District Court No. 1 of Tarrant County, Texas
The Honorable Elizabeth Beach, Presiding

**STATE'S BRIEF ON THE MERITS OF
STATE'S PETITION FOR DISCRETIONARY REVIEW**

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STATEMENT OF THE CASE

This case addresses whether collateral estoppel bars the State from prosecuting a previously-acquitted defendant for conduct temporally and geographically separate from his prior conduct and occurring after intervening circumstances.

STATEMENT OF PROCEDURAL HISTORY

The appellant was prosecuted in cause number 1485668D for the January 16, 2017, shooting death of Breon Robinson at a Conoco Fuel Station in Fort Worth. (Supp. C.R. I:269-75; R.R. IX:9-15). The jury found him “not guilty” of capital murder, murder and aggravated robbery with a deadly weapon. (Supp. C.R. I:274-75, R.R. X:4).

The appellant was indicted in cause number 1503620D for the January 16, 2017, aggravated robbery and aggravated assault of Jkeiston Levi. (Supp. C.R. I:8).¹ The appellant filed a pre-trial motion for writ of habeas corpus contending that collateral estoppel bars his current prosecution because a prior jury had already found that he was not a party to offenses of capital murder, murder and aggravated

1 The aggravated robbery allegation charges the appellant (as a principal or party) with shooting Mr. Levi while robbing him – conduct that clearly occurred at the Conoco Fuel Station. The aggravated assault allegation charges the appellant (as a principal or party) with shooting Mr. Levi – conduct which occurred on Childress Street as Mr. Levi was fleeing to the hospital.

robbery. (C.R. I:4-9). The trial court denied the appellant's collateral estoppel request regarding the aggravated assault charge. (C.R. I:25).²

In reversing the trial court, the court of appeals reasoned that the jury in the first trial necessarily acquitted the appellant (as either the actual shooter or a party) in the Childress Street shooting when it decided that he was not the shooter or a party to the Conoco Fuel Station shooting. *Ex parte Richardson*, 2021 WL 1134458 at *9 (Tex. App. – Fort Worth March 25, 2021) (not designated for publication). This Court granted review to determine whether collateral estoppel bars this prosecution. See Order Granting State's Petition for Discretionary Review.

ISSUES PRESENTED

1. Whether issue preclusion principles such as collateral estoppel are applicable in determining if a prosecution is barred by double jeopardy.
2. Whether collateral estoppel barred the State from prosecuting a defendant for conduct occurring at a different time and place than the original conduct for which the defendant was acquitted when ongoing or intervening circumstances may have changed his culpable mental state between the originally-prosecuted conduct and the potentially-prosecutable later conduct

2 The State recognized that the appellant's prior acquittal estops it from prosecuting him for conduct occurring at the Conoco Fuel Station ostensibly on findings that he was merely present when Keoddric Polk shot and killed Mr. Robinson and that he should not have anticipated Polk's actions that night. The prior acquittal should not estop the State from prosecuting the appellant for the second shooting on Childress Street because it occurred at a different place and time from the earlier robbery/shooting, and after Polk's actions undercut any "lack of awareness" on his part. (C.R. I:11-21; R.R. XI:9-11).

SUMMARY OF THE ARGUMENT

The Seventh Amendment principle of issue preclusion has been inappropriately grafted onto the Fifth Amendment protection against double jeopardy when that protection's original understanding concerned repeated prosecutions for the same offense and not the relitigation of issues or evidence and where confidence in the initial result's correctness is unwarranted due to the State's inability to obtain appellate review of acquittals.

Collateral estoppel should not apply to the Childress Street shooting because it involves a second crime scene temporally and geographically separate from the Conoco Fuel Station murder/robbery. The first jury did not necessarily address the changed or intervening circumstances between the two shootings. Collateral estoppel's application herein violates its limited nature and provides an unjust windfall to defendants who allegedly commit multiple unique offenses in an extended crime spree.

ARGUMENT

The United States Constitution provides that “no person shall be subject for the same offense to be twice put in jeopardy of life or limb”. **U.S. Const. amend. V**. This clause provides that no person may be tried more than once “for the same offense”. *Currier v. Virginia*, ___ U.S. ___, 138 S.Ct. 2144, 2149, 201 L.Ed.2d

650 (2018). Double jeopardy recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek; however, it should not impose an insuperable obstacle to the administration of justice where there is no semblance of any such oppressive practices. *Currier v. Virginia*, 138 S.Ct. at 2149. The appellant claims that any prosecution for the Childress Street shooting violates double jeopardy (via collateral estoppel) because he was acquitted in the Conoco Fuel Station shooting.

A. Should Collateral Estoppel Apply in Criminal Prosecutions

Collateral estoppel stands for the principle that, when an issue of ultimate fact has been determined by a valid and final judgment, the State cannot again litigate this same issue against the same parties in any future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 443, 445, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970); *Ex parte Adams*, 586 S.W.3d 1, 4 (Tex. Crim. App. 2019); *Murphy v. State*, 239 S.W.3d 791, 794 (Tex. Crim. App. 2007); *Ex parte Watkins*, 73 S.W.3d 264, 267 (Tex. Crim. App. 2002). In *Ashe v. Swenson*, the Supreme Court recognized that the concepts of collateral estoppel and issue preclusion are embodied within the double jeopardy constitutional protection. See *Ashe v. Swenson*, 397 U.S. at 445, 90 S.Ct. at 1194. This Court has adopted this directive. See *Ex parte Adams*, 586 S.W.3d at 4;

Murphy v. State, 239 S.W.3d at 794; *Ex parte Watkins*, 73 S.W.3d at 267.

A plurality of the Supreme Court has begun questioning whether collateral estoppel should apply to criminal prosecutions and whether it comports with the Double Jeopardy Clause's original meaning. *Currier v. Virginia*, 138 S.Ct. 2144, 2149-50. The plurality cast the suggestion that issue relitigation can sometimes amount to the impermissible relitigation of an offense represented a significant innovation in double jeopardy jurisprudence. *Currier v. Virginia*, 138 S.Ct. at 2149. Noting that the clause's plain text does not mention any prohibitions concerning the relitigation of issues or evidence, the plurality concluded that double jeopardy may have been intended to bar "only repeated 'prosecution for the same identical act *and* crime,' not the retrial of particular issues or evidence". *Currier v. Virginia*, 138 S.Ct. at 2152-53; **U.S. Const. amend. V**. The original public understanding of double jeopardy likewise focused on repeated prosecution for the same offense and not the relitigation of issues or evidence. See *Currier v. Virginia*, 138 S.Ct. at 2153, *citing Turner's Case*, 84 Eng. Rep. 1068 (K.B. 1663), (defendant acquitted of breaking into a home and stealing money from the homeowner may be subsequently prosecuted for stealing money "at the same time" from a household servant). Put simply, applying collateral estoppel with a complete relitigation bar of issues or evidence risks taking double jeopardy jurisprudence outside its traditional focus of barring retrial of the same offense and into an area of regulating

the retrial of issues or evidence which the Supreme Court has never sought. See *Currier v. Virginia*, 138 S.Ct. at 2153.³

The Seventh Amendment, which concerns civil suits, limits the reexamination of a “fact tried by jury”. **U.S. Const. amend. VII**. The Fifth Amendment contains no similar issue preclusion doctrine. *Currier v. Virginia*, 138 S.Ct. at 2152. As noted by the plurality, civil preclusion principles and double jeopardy are different doctrines, with different histories, serving different purposes beyond merely promoting judicial economy:

[Promoting judicial economy] may make special sense in civil cases where often only money is at stake. But the Double Jeopardy Clause and the common law principles it built upon govern *criminal* cases and concern more than efficiency. They aim instead, as we’ve seen, to balance vital interests against abusive prosecutorial practices with consideration to the public’s safety.

Currier v. Virginia, 138 S.Ct. at 2156 (internal citations and quotations omitted).

Given these differences, it remains questionable whether an issue preclusion principle (such as collateral estoppel) should even be applied in determining whether a prosecution is jeopardy-barred.⁴

3 Two judges on this Court have also post-*Currier* expressed reservations whether the civil doctrine of collateral estoppel is truly embodied within the text or history of the Fifth Amendment. See *State v. Waters*, 560 S.W.3d 651, 663 (Tex. Crim. App. 2018) (Newell, J., and Hervey, J., concurring).

4 A secondary issue arising from applying issue preclusion to criminal cases is that preclusion is based on an underlying confidence that the initial result was substantially correct since the precluded civil party had the opportunity for its appellate review. *Currier v. Virginia*, 138 S.Ct. at 2154. No such confidence is

B. Should Collateral Estoppel Apply to this Criminal Prosecution

Collateral estoppel is a limited doctrine that only forbids a second trial if a conviction in that trial requires a finding in the government's favor on a specific issue or factual determination which the jury necessarily resolved in a defendant's favor in the first trial. *Ex parte Adams*, 586 S.W.3d at 5, citing *Currier v. Virginia*, 138 S.Ct. at 2150; *Murphy v. State*, 239 S.W.3d at 794-95. Collateral estoppel does not preclude a second prosecution simply because it is unlikely – or even very unlikely – that the original jury acquitted without finding the fact in question. *Ex parte Adams*, 586 S.W.3d at 5. The mere possibility that a fact may have been previously determined is insufficient to bar re-litigation of that same fact in a second trial. *Ex parte Watkins*, 73 S.W.3d at 268.

Collateral estoppel requires the court to analyze:

- (1) exactly what facts were necessarily decided in the first proceeding; and
- (2) whether those “necessarily decided” facts constitute essential elements of the offense in the second trial.

Murphy v. State, 239 S.W.3d at 795. The court must determine whether the jury necessarily resolved a specific fact in a defendant's favor, and if so, how broad – in terms of time, space and content – was the scope of its finding. *Ex parte Watkins*,

warranted in criminal cases because the State cannot obtain appellate review of acquittals. *Currier v. Virginia*, 138 S.Ct. at 2154-55. Thus, wide-spread application of preclusion in criminal cases should raise caution. See *Bravo-Fernandez v. United States*, ___ U.S. ___, 137 S.Ct. 352, 358, 196 L.Ed.2d 242 (2016).

73 S.W.3d at 268. The previously-litigated fact should arise in the same transaction, occurrence, situation, or criminal episode in both prosecutions and be an essential element of the second prosecution. *Murphy v. State*, 239 S.W.3d at 795. Collateral estoppel limitations dictate that the particular fact litigated in the first prosecution must be the exact fact at issue in the second prosecution. *Murphy v. State*, 239 S.W.3d at 795. A defendant has the burden to prove that the facts in issue were necessarily decided in the prior proceeding. *Murphy v. State*, 239 S.W.3d at 795.

The court of appeals reasoned that:

In the instant case, count two of Richardson’s indictment – the aggravated assault count – alleges that he intentionally or knowingly caused bodily injury to Levi by shooting him with a firearm and used or exhibited a deadly weapon (firearm) during the commission of the assault. To convict on this count, the jury would have to find that Richardson was a party to the second shooting.

Given the pleadings, the jury charge, the disputed issues, and the evidence presented at trial, the jury in the first trial necessarily decided that Richardson was not a shooter and that he had been merely present rather than an accomplice to Polk’s acting as the shooter. Because the jury had already acquitted Richardson of murder *by shooting* with the requisite mental state, either as the actual shooter or as a party, the question of whether Richardson was the shooter was decided in the first trial.

Ex parte Richardson, 2021 WL 1134458 at *9 (emphasis in original) (citations and footnotes omitted). This reasoning can be interpreted two ways:

1. Defendant’s acquittal for the capital murder/robbery of Breon Robinson at the Conoco Fuel Station collaterally estops his prosecution for any future criminal misconduct that night, such as shooting at Jkeiston Levi,

- on Childress Street despite the temporal and geographic separation between the two events and the occurrence of intervening circumstances; or
2. Defendant's conduct that night cannot be carved into multiple prosecutable offenses even if those offenses did not occur at the same moment or in the same location.

Either interpretation misapplied the law and overrode the limitations of collateral estoppel.

In the first prosecution, the jury determined whether the appellant, either acting alone or as a party:

- Intentionally caused Breon Robinson's death by shooting him with a firearm while robbing or attempting to rob him (capital murder);
- Intentionally or knowingly caused Breon Robinson's death by shooting him with a firearm (murder);
- With intent to cause serious bodily injury, intentionally shot Breon Robinson and caused his death (murder); and
- While committing theft of property and with intent to obtain or maintain control of that property, intentionally or knowingly caused bodily injury to Breon Robinson by shooting him with a firearm, or threatening or placing him in fear of imminent bodily injury or death by using or exhibiting a firearm (aggravated robbery).

(Supp. C.R. I:271-72). Given its finding that the appellant was merely present at the Conoco Fuel Station when Polk shot and killed Mr. Robinson while attempting to rob him, and could not have anticipated Polk's actions that night, the jury likely necessarily found that the appellant was merely present when Polk simultaneously robbed Mr. Levi and could not have anticipated that robbery. Thus, even under its limitations, collateral estoppel bars prosecuting the appellant for allegedly robbing

Mr. Levi inside his parked car at the Conoco Fuel Station.

The events of January 16, 2017, however, did not end with Polk fatally shooting Mr. Robinson inside Mr. Levi's parked car while robbing them; rather, it continued with someone (either the appellant or Polk) shooting Mr. Levi on Childress Street as he was driving towards a hospital – a second crime scene temporally and geographically separate from the Conoco Fuel Station murder/robbery. (R.R. V:44, 64, 71-73, 85, 113, VI:98-101, 106-07, VII:69, 84-86, XII:State's Exhibit #2). The aggravated assault allegation embraces this wider range of criminal misconduct. (C.R. I:8). Nothing in the first jury's verdict acquitting the appellant of the capital murder, murder or aggravated robbery at the Conoco Fuel Station necessarily addressed whether he was "merely present" when he got back inside Polk's car to pursue Mr. Levi, whether he "should not have anticipated" that Polk would fire at Mr. Levi since he had just witnessed Polk fatally shoot Mr. Robinson, or whether he is potentially the actual Childress Street shooter – all intervening circumstances undercutting the jury's prior "lack of involvement or intent" or "non-anticipation of behavior" determinations.

Where conduct in the new prosecution is separate and distinct from the previously prosecuted offense and does not necessarily contest a litigated fact, then collateral estoppel does not bar further prosecution. See *Ex parte Desormeaux*, 353 S.W.3d 897, 901-03 (Tex. App. – Beaumont 2011, pet. refused) (State not

collaterally estopped from prosecuting stepmother for injury to a child based on failure to seek medical treatment even though she had been acquitted of intentionally or knowingly committing that same blunt force trauma which caused her stepson's death); *Ex parte Chafin*, 180 S.W.3d 257, 260 (Tex. App. – Austin 2005, no pet.) (State not estopped from prosecuting defendant for indecency with a child by exposing his genitals where his convictions for indecency with a child by contact arising from the same incident had been found legally insufficient). This reasoning is consistent with the limited scope of collateral estoppel previously articulated by the Supreme Court and this Court.

Ashe v. Swenson and *Ex parte Watkins* factually differ because nothing changed the discrete fact litigated at the first trial from the facts at issue in the second trial. In *Ashe v. Swenson*, there was no temporal or geographic separation between the offenses being prosecuted. See *Ashe v. Swenson*, 397 U.S. at 437-39, 446, 90 S.Ct. at 1191-92, 1195-96 (where petitioner was acquitted of robbing one player in poker game based upon insufficient evidence of identity, State could not prosecute him for robbing a second player in that same game where all men were robbed simultaneously). By contrast, the second shooting herein occurred in a different location some minutes later.

In *Ex parte Watkins*, there was no intervening circumstance altering Watkins' state of mind – the discrete litigated fact in question – during the brief temporal

separation between the two shootings. See *Ex parte Watkins*, 73 S.W.3d at 265, 275 (State estopped from re-litigating sudden passion in prosecution for shooting of wife’s boyfriend where prior jury found he killed his wife in sudden passion during the same criminal transaction). Here, the intervening circumstances of Polk shooting Breon Robinson to death and the appellant getting back inside Polk’s car undercuts any determination that the jury’s “lack of involvement or intent” or “non-anticipation of behavior” findings regarding Mr. Robinson’s shooting necessarily resolved whether the appellant intended or should have anticipated Mr. Levi’s subsequent shooting.

In sum, the appellant’s prior acquittal for the Conoco Fuel Station shooting did not necessarily resolve his culpability for the Childress Street shooting; thus, its prosecution should not be barred by collateral estoppel.⁵

5 Additionally, adopting the appellate court’s “singular event” theory of collateral estoppel – treating the Childress Street shooting and the Conoco Fuel Station capital murder/robbery as a singular event with a singular culpable mental state – would unjustifiably limit the State to a single prosecution despite the occurrence of multiple instances of potentially-prosecutable conduct. This Court long ago adamantly rejected its prior incarnation (known as the carving doctrine) as an unjust windfall:

When the carving doctrine may be applied to a situation in which a defendant robs, kidnaps, rapes, and murders his victim, the defendant suffers no more punishment than he would had he committed only one of the crimes. Justice and reason demand prosecution for each of the separate offenses so that a robber will be deterred from kidnapping, raping, and murdering the victim.

See *Ex parte McWilliams*, 634 S.W.2d 815, 822 (Tex. Crim. App. 1980). See also *Ex parte Scales*, 853 S.W.2d 586, 586-88 (Tex. Crim. App. 1993) (describing carving doctrine as “a judicially developed rule barring multiple prosecutions and convictions ‘carved’ out of a single criminal transaction” and explaining that it

CONCLUSION

The State is not collaterally estopped from prosecuting the appellant for the Childress Street shooting since it involves conduct occurring at a different time and place than the previously-acquitted conduct, and where intervening circumstances suggest a changed mental state from the one previously determined adversely to the State. Furthermore, it is questionable whether the doctrine of collateral estoppel should have any application to criminal prosecutions.

PRAYER

The State prays that this Court reverse the court of appeals' decision and affirm the trial court's collateral estoppel ruling.

Respectfully submitted,

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represented substantive policy in which “no more than one offense ever resulted from a single criminal transaction”). Multiple criminal offenses should not be limited to a single prosecution where the offenses occurred in different places, at different times and with potentially different culpable mental states.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word count requirements of Tex. R. App. P. 9.4 because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains approximately 2700 words, excluding those parts specifically exempted, as computed by Microsoft Office Word 2016 - the computer program used to prepare the document.

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